No. 90-450

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990



**THADDEUS FAVIAN JACKSON, A/K/A CHARLES EDWARD JACKSON,**
*Petitioner*

v.

**THE STATE OF TEXAS,**
*Respondent*

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*PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS*

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Does a Texas rule of law establishing that a defendant waives the right to appeal his conviction on grounds of insufficient evidence if that defendant moves for and does not carry a motion for instructed verdict and thereafter presents defense evidence impermissibly deny Petitioner's right to due process under the provisions of the fourteenth amendment to the United States Constitution?

Does a rule of law that purports to deny a defendant the right to appeal his conviction on the grounds of insufficient evidence if the trial court denies defendant's motion for instructed verdict at the close of the State's evidence and that defendant thereafter proceeds to present evidence in his defense, an infringement on the defendant's right of due process under the fourteenth amendment to the U.S. Constitution, when that rule of law compels the defendant to choose between his basic Constitutional right of Trial by Jury and his right of due process (which protects his right of appeal of an adverse decision)?

## LIST OF PARTIES

**The caption of the case in this Court contains the names of all parties to the proceedings in the courts below.**

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**APPENDIX**

The Opinion of the Court of Appeals for the Fourteenth Supreme Judicial District of the State of Texas, Jackson v. State, -- S.W.2d -- (Tex. App.--Houston [14th Dist.] 1989, pet. denied) (unpublished).

Order denying Petition for Discretionary Review by the Court of Criminal Appeals in the State of Texas, March 28, 1990.

Order denying Motion for Rehearing of Petition for Discretionary Review by the Court of Criminal Appeals in the State of Texas, April 27, 1990.

## TABLES OF AUTHORITIES

### Cases Cited

## Constitutions and Statutes

## DECISIONS BELOW

The decisions of the courts below for which review is sought are as follows:

1. Decision of the Court of Criminal Appeals of the State of Texas denying Petitioner's Motion for Rehearing on Petition for Discretionary Review: Jackson v. State of Texas, Cause No. 0116-90, no opinion issued.

2. Decision of the Court of Criminal Appeals for the State of Texas denying discretionary review of the holding of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas (No. 0116-90): Jackson v. State of Texas, no opinion issued.

3. Opinion of the Texas Court of Appeals for the Fourteenth Supreme Judicial District affirming Petitioner's conviction (No. 14-88-00291-CR, Jackson v. State of Texas, -- S.W.2d -- (Tex. App.--Houston [14th Dist.] 1989, pet. denied).

## THIS COURT'S JURISDICTION

The decision of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas (hereinafter "Court of Appeals") affirming Petitioner's conviction in the trial court was made and entered on October 26, 1989. The Texas Court of Criminal Appeals (hereinafter "Court of Criminal Appeals"), the criminal court of last resort in the State of Texas, thereafter denied Petitioner's Petition for Discretionary Review on March 28, 1990. The Texas Court of Criminal Appeals denied Petitioner's Motion for Rehearing on April 27, 1990.

Therefore, this Court has jurisdiction to review the decisions in question by writ of certiorari under the provisions of 28 U.S.C.A. § 1257(a) (West 1966 & Supp. 1990).

## CONSTITUTIONAL PROVISIONS INVOLVED

Question No. 1: (Does Texas rule of law impermissibly infringe on Petitioner's right of due process, specifically, appeal?)

Amendment XIV, Section 1 of the Constitution of the United States provides, in part that:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;. . . .."

U.S. Const. amend. XIV, § 1, cl. 2. (emphasis added).

## STATEMENT OF THE CASE

1. Facts

This case involves a challenge to a decision by the court of criminal appeals to deny Petitioner's Petition for Discretionary Review of the holding of the court of appeals affirming the conviction of the Petitioner at trial. Petitioner's conviction was obtained in violation of his rights of due process under the protection of the fourteenth amendment to the United States Constitution.

The Petitioner was convicted at trial by a jury of the offense of Theft by Receiving after a plea of not guilty; the punishment was tried to the court and was assessed by the court after enhancement at five years confinement in the Texas Department of Corrections. This conviction was affirmed by the court of appeals sitting in Houston, Texas, in an opinion delivered on October 26, 1989.

The court of appeals rendered its decision affirming Petitioner's conviction on October 26, 1989. Thereafter, Appellant and Petitioner herein filed a Motion to Extend Time for Filing a Motion for Rehearing which was granted on November 16, 1989, by the court of appeals. The time for filing the Motion for Rehearing was extended to and including November 30, 1989. Petitioner then under the extended time for filing a Motion for Rehearing did file said Motion within the time limit set. On December 14, 1989, the court of appeals overruled Petitioner's Motion for Rehearing in this cause. Petitioner

thereafter timely filed his Petition for Discretionary Review by the court of criminal appeals on January 12, 1990. Petition was denied by that court March 28, 1990, and Petitioner's timely Motion for Rehearing was denied, and filed by that court April 27, 1990 (opinion not published).

The court of criminal appeals erred in denying Petitioner's Petition for Discretionary Review because the court of appeals erred in holding that the trial court did not err by refusing to grant Petitioner's Motion for an Instructed Verdict at the conclusion of the State's evidence because Petitioner, after the denial of the request for instructed verdict, proceeded to present defense evidence, and thereby waived any alleged error by the trial court.

The Texas Court of Criminal Appeals has arbitrarily established a rule, recently cited in Springer v. State, 721 S.W.2d 510 (Tex. App.--Houston [14th Dist.] 1986, pet. ref'd) (see also Bellah v. State, 415 S.W.2d 418 (Tex. Crim. App. 1967), which in effect

requires that a Defendant must always refrain from presenting defense evidence after he has made a request for an instructed verdict of not guilty that he believes was denied in error. This rule, in contravention of basic rights and appeal procedures protected by the U.S. Constitution (once that right is provided by a state), puts a Defendant in an untenable position. The Defendant must gamble his right to a trial by jury, whose possible verdict of not guilty would acquit him of the alleged offense, against his right to appeal the sufficiency of the State's evidence, and the hope that he is correct in his assertion that the evidence was insufficient to support a conviction in the case. This puts the Defendant/Appellant in the unenviable position of having to make a choice between his basic Constitutional rights of Trial by Jury and his rights of Due Process protected by his right of appeal of an adverse decision.

However, this harsh Texas rule is mitigated somewhat (nevertheless still depriving the defendant due process

protection) by a collateral rule that provides that trial error is waived "upon presentation of defense evidence after a motion for instructed verdict is denied only if the defendant testifies only at the punishment phase, *and admits his guilt*. See Winter v. State, 725 S.W.2d 728 (Tex. App.--Houston [1st Dist.] 1986, no pet.); DeGarmo v. State, 691 S.W.2d 657, 661 (Tex. Crim. App. 1985). The record will clearly show that Petitioner, while presenting defense evidence, did not himself testify, nor did he admit his guilt during the punishment phase after the jury returned their verdict of guilty.

2. Federal Question Raised Below

Petitioner raised the federal constitutional question presented in this Petition for Writ of Certiorari in his appeal to the court of appeals of his conviction in the trial court. Although Petitioner argued on appeal that the State's evidence was insufficient for conviction, this argument was premised on the due process analysis presented

herein. The court of appeals rejected Petitioner's sixth and fourteenth amendment objections. See opinion, App-1.

Petitioner similarly raised the constitutional question presented in his Petition for Discretionary Review by the court of criminal appeals. Again, Petitioner urged the court to provide Petitioner with due process in the appeal process, and to apply the Winter collateral rule, and thus overturn Petitioner's conviction. The court of criminal appeals, without opinion, denied Petitioner's Petition for Discretionary Review, and Petitioner's Motion for Rehearing, also without opinion.

## REASONS FOR GRANTING CERTIORARI

1. Does a Texas rule of law establishing that a defendant waives his right to appeal his conviction on grounds of insufficient evidence if that defendant moves for and does not carry a motion for instructed verdict and thereafter presents defense evidence impermissibly deny Petitioner's right to due process under the provisions of the fourteenth amendment to the United States Constitution?

Petitioner challenges this Texas rule of law as an impermissible infringement on his rights to due process under the provisions of the fourteenth amendment of the United States Constitution. The rule of law in question implicates due process because it compels a defendant in a criminal proceeding to risk an acquittal, and to choose between his constitutional right to a trial by jury and his rights of due process on appeal. Thus, a defendant must choose between his right of appeal on grounds of insufficiency of the State's evidence (waived under the rule if he presents defense evidence), and his right to a trial on guilt or innocence and a trial to determine punishment. Such a choice represents a "condition" imposed on the right of appeal granted by the Texas Constitution (Tex. Const. art. V, § 26), and thus abrogates the United States Constitution.

While a state is not required to provide a means of appeal in order to meet demands of due process, when it has provided a means of appeal it cannot put limitations on it which

are . . . arbitrary and totally unrelated to any possible state purpose. Nebraska State Bank v. Dudley, 278 N.W.2d 334 (Neb. 1979), app. dism'd, 444 U.S. 804 (1980); see also Compton v. Naylor, 392 F. Supp. 575 (S.D. Texas 1985). The State of Texas cannot enunciate a valid state purpose for limiting a defendant's right to grounds of appeal in the way it limited Petitioner, and the TExas courts have yet to enunciate a reasonable and valid purpose for this "condition."

It is well established that a verdict in a criminal trial "must be based upon evidence developed at trial. . . " Irvin v. Dowd, 366 U.S. 717 (1961). If a defendant is prevented from presenting evidence by the threat of the elimination of possible appeal, when that right of appeal has been provided by the state and is thus guaranteed him, such action is clearly violative of, and the rule permitting the action is repugnant to the United States Constitution. An argument that the Texas rule merely "chills" post-conviction review and "must be tolerated" fails because the State

cannot adduce any "legitimate state objectives" for such limitation, and the limitation itself is not "fair and reasonable." Lemieux v. Robbins, 414 F.2d 353 (2nd Cir.), cert. denied, 397 U.S. 1017 (1969).

Once a state establishes avenues of appellate review, such avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. Williams v. Oklahoma City, 395 U.S. 458 (1969); see also Blackledge v. Perry, 417 U.S. 21 (1974). The right to appeal, once provided by a state, *must meet the requirements of [the fourteenth amendment to] the United States Constitution*. Chapman v. State of Texas, 242 F. Supp. 378 (N.D. Tex. 1965) (emphasis added); see also Burns v. State of Ohio, 360 U.S. 252 (1959); Griffin v. State of Illinois, 351 U.S. 12 (1956). By no other means than a cursory dismissal of Petitioner's argument, both the court of appeals and the court of criminal appeals, without discussion, abridged Petitioner's

constitutionally guaranteed due process protection. In the absence of fair and reasonable and legitimate state and or judicial interests in so limiting a defendant's fundamental right to appeal his criminal conviction, such limitation must be held to be a violation of due process.

A right is fundamental where it is explicitly or implicitly guaranteed by [a] constitution. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). The right to appeal, once provided by a state, is clearly a fundamental right. Regan v. Taxation with Representation, 461 U.S. 540, 547 (1983). ("[Limitations] are subjected to [closer] . . . scrutiny if they interfere with the exercise of a fundamental right. . ."). "[Limitations] that paralyze the exercise of a fundamental right must be narrowly drawn to promote only that interest or it violates [the Constitution]." Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977). Here, the rule on appeals in Texas infringes on Petitioner's rights, and is overbroad and

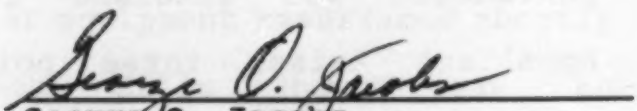
unreasonable. Further, even at a lower standard of review--that of a rational basis for the limitation--the State fails to carry its burden. Neither the court of criminal appeals or the courts of appeal in Texas can explain how limiting a defendant's right of appeal serves any legitimate state or judicial interest, because there is no such state or judicial interest to be served.

This Court should grant certiorari because the decision of the court of appeals, which the court of criminal appeals declined to review, is in conflict with the decisions of this Court, and the decisions of the federal courts cited above on this important federal question.

## CONCLUSION

This Court should grant the petition because the question above deals with important constitutional rights of persons convicted of a crime and wishing to exercise their right of appeal afforded by the State. This Court has not yet fully addressed the constitutional validity of court rules or appellate limitations that compel a defendant to surrender his constitutional right of a trial by jury when exercising his right to defend himself, and thereafter appeal his conviction.

Respectfully submitted,



George O. Jacobs
Attorney for Petitioner

**Affirmed and Opinion filed October 26, 1989.**

**In the**

**Fourteenth Court of Appeals**

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**NO. C14-88-00291-CR**

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**THADDEUS FAVIAN JACKSON, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 486913

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## OPINION

Appellant was convicted by a jury of theft by receiving. After enhancement his punishment was assessed at five years. Appellant raises three points of error. First, he alleges that the court committed error by failing to enter an instructed verdict. In the second point of error he claims that the state's evidence was insufficient to show knowledge that the computer equipment in question was stolen.

Finally, in his third point of error he argues that the court wrongfully refused to grant a challenge for cause of a venireman. Finding no error below, we affirm.

This conviction resulted from events that followed the discovery by Paul Koszela when he arrived at work on February 2, 1987. His personal desktop Compaq computer was missing. He reported the equipment stolen, and gave the police the serial numbers and other information about the unit that would further aid in identification, specifically, that a knob was missing from the monitor as well as the nature of the data contained on the hard disk.

The computer equipment resurfaced shortly thereafter when Ellis Munoz saw an advertisement in the newspaper for a computer for sale. He followed up on the ad and purchased the computer from Appellant for $750.00. Thinking that this deal was too good to be true, he checked with the Conroe police department to determine if any computer equipment with the serial numbers which

appeared on the unit he purchased had been reported stolen. Sure enough, the numbers matched the equipment reported by Mr. Koszela. Mr. Munoz turned the equipment over to the police.

The appellant's first point of error, that the trial court erred in not giving an instructed verdict of not guilty, is waived. Following the denial of the request for an instructed verdict, the appellant proceeded to put on defense evidence. This constitutes waiver of the alleged error. *Kuykendall v. State*, 609 S.W.2d 791, 794 (Tex. Crim. App. 1981); *Springer v. State*, 721 S.W.2d 510, 513 (Tex. App. --Houston [14th Dist.] 1986, pet. ref'd).

In his second point of error, appellant alleges that there was insufficient evidence to show that he exercised control over the computer equipment with knowledge that it was stolen. Our standard on a sufficiency of evidence question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact

could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979). This standard also applies to cases relying on circumstantial evidence, so long as the circumstantial evidence excludes every reasonable hypothesis other than the guilt of the defendant. *Carlson v. State*, 654 S.W.2d 444, 449-50 (Tex. Crim. App. 1983)(en banc). This standard is satisfied if the finding of guilt is supported by the cumulative force of all the evidence. *Brandley v. State*, 691 S.W.2d 699, 703 (Tex. Crim. App. 1985)(en banc).

There is evidence in the record indicating that the appellant knew that the computer equipment was stolen. First, he represented to Mr. Munoz that he had purchased the equipment as a part of a package deal and he was selling it because he did not need it. Later, when a police sergeant questioned appellant about the computer, he indicated that he purchased the computer two months earlier from a company called CCX, but he had

no receipt. The officer knew this equipment could not have been bought two months earlier by appellant, because it was in Mr. Koszela's office less than two weeks prior to its appearance in the appellant's body shop.

Appellant also told the police that he had loaned the computer to a white male whose name and address he did not know and that it had been returned on February 7, 1987. Later he changed his story. He told the sergeant on the telephone that actually it had been an IBM he purchased from CCX. He claimed that he loaned the IBM to a woman named Renee Ellis, who returned this Compaq computer instead of the IBM.

The appellant produced receipts for the purchase of a Compaq computer from CCX in November of 1986, and an IBM in January of 1987. The serial numbers for the Compaq described in the receipt did not match the ones on the equipment in question. He also produced a receipt allegedly from Renee Ellis showing the return of a Compaq computer with the serial numbers of Mr. Koszela's computer

to the appellant, but the appellant's girlfriend testified that Renee Ellis did not give them a receipt.

With this evidence, a rational jury could find beyond a reasonable doubt that appellant knew this equipment was stolen and that he exercised control over it. The second point of error is overruled.

The appellant's third point of error reflects his contention that the trial court erred by denying his motion to strike a juror for cause. Appellant asserts a juror, Ms. Schulte, testified on voir dire that she would give more credibility to a police officer as a witness for the sole reason that he was a police officer. A juror may be challenged for cause if it is shown the juror has ". . . bias or prejudice in favor of or against the defendant." Tex. Crim. Proc. Code Ann. art. 35.16(a)(9) (Vernon 1989). A juror's inability to impartially judge the credibility of a police officer would qualify as grounds for a challenge for cause. *Hernandez v. State*,

563 S.W.2d 947, 950 (Tex. Crim. App. 1978)(en banc).

However in this case the juror in question indicated that she would be able to assess the testimony of an officer fairly and impartially. The misunderstanding as to her comment regarding credibility of a police officer arose from a question which was posed concerning the relative credibility of a lay witness as opposed to an officer in the observation of minor detail, such as the color of a shirt. Ms. Schulte stated that the officer's testimony regarding the observation may carry more weight due to the officer's training, background and experience in observing such details. Upon further questioning by appellant's counsel, the prosecutor, and the trial judge, she clarified that she would not automatically give the police officer more credibility, that she would have to ". . . look at the overall picture and take it in context." Thus, the trial court did not abuse its discretion by denying the challenge for cause as to Ms.

Schulte. *See Gardner v. State*, 730 S.W.2d 675, 692-93 (Tex. Crim. App. 1987)(en banc).

Furthermore, the appellant did not prove that he exhausted all of his peremptory challenges and was denied additional peremptory challenges which prevented him from keeping this juror off the jury. Thus, no harm is shown. *Green v. State*, 764 S.W.2d 242, 247 (Tex. Crim. App. 1989)(en banc). The appellant's third point of error is overruled. We affirm the decision of the trial court.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion file October 26, 1989.

Panel consists of Justices Pressler, Cannon, and Ellis.

Do Not Publish - Tex. R. App. P. 90.

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The Petitioner petitioned for discretionary review by the Court of Criminal Appeals for the State of Texas, and said petition was denied on March 28, 1990, as follows:

**IN THE COURT OF CRIMINAL APPEALS**
**FOR THE STATE OF TEXAS**

**NO. 0116-90**

| | | |
|---|---|---|
| **THADDEUS FAVIAN JACKSON,** | ) | |
| **Appellant** | ) | |
| | ) | **ORDER** |
| **V.** | ) | **DENYING** |
| | ) | **REVIEW** |
| **THE STATE OF TEXAS,** | ) | |
| **Appellee** | ) | |

Appellant's Petition for Discretionary Review is hereby DENIED.

DATE: March 28, 1990

/s/
JUSTICE, COURT OF CRIMINAL
APPEALS FOR THE STATE OF TEXAS

* * * * * * * *

Petitioner moved for rehearing on his Petition for Discretionary Review, and the motion was denied on April 27, 1990.

**IN THE COURT OF CRIMINAL APPEALS**
**FOR THE STATE OF TEXAS**

**NO. 0116-90**

| | | |
|---|---|---|
| **THADDEUS FAVIAN JACKSON,** | } | |
| **Appellant** | } | |
| | } | **ORDER** |
| **V.** | } | **DENYING** |
| | } | **REHEARING** |
| **THE STATE OF TEXAS,** | } | |
| **Appellee** | | |

Appellant's Motion for Rehearing on Petition for Discretionary Review is hereby DENIED.

DATE: April 27, 1990

/s/
JUSTICE, COURT OF CRIMINAL
APPEALS FOR THE STATE OF TEXAS

**CERTIFICATE OF SERVICE**

This will certify that the requisite forty corrected copies of this Petition for Writ of Certiorari to the United States Supreme Court were forwarded to the Clerk of the Court this the 31st day of August, 1990; and

Further, the requisite three corrected copies each were forwarded to all parties to this action on this the 31st day of August, 1990, specifically to

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